INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 109

FEDERAL POWER COMMISSION, ET AL., PETITIONERS

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Fifth Circuit, directing the distribution of impounded funds, entered in the above-entitled case on May 12, 1948.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

JURISDICTION

The order of the Circuit Court of Appeals was entered on May 12, 1948 (R. 109-112). The juris-

diction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pending judicial review of an order of the Federal Power Commission (Commission) under the Natural Gas Act, directing Interstate Natural Gas Company, Incorporated, (Interstate) to reduce its wholesale interstate rates for natural gas, there accumulated, pursuant to a stay order issued by the court below, a fund of $2,765,205, representing the difference between the rates prescribed by the Commission and the rates collected by Interstate under the stay order. After the Commission's order was sustained by this Court in *Interstate Natural Gas Company v. Federal Power Commission*, 331 U. S. 682, Interstate moved in the court below for an order directing the distribution of the accumulated fund. The court below, notwithstanding the provision in its original stay order that the money was "to be returned to [the] ultimate consumers of gas, or other persons * * * as contemplated by the provisions of the National Gas Act", considered itself compelled by this Court's decision in *Central States Co. v. City of Muscatine*, 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers from Interstate, who were themselves natural gas companies, as defined by the Natural Gas Act, and thus subject exclusively to the jurisdiction of the Commission in respect of their wholesale sales. Their rates, in

turn, during the impoundment period, had been found by the Commission to have been excessive without regard to the lower costs which would result from the Interstate reduction and during or immediately prior to the impoundment period had been ordered reduced to reasonable levels. The questions presented are:

(1) Whether the *Central States* case here compels the distribution of the accumulated fund to Interstate's immediate purchasers as a matter of law. And, if so,

(2) Whether the *Central States* case should be reexamined and either modified or disapproved.

STATEMENT

The Federal Power Commission, on April 27, 1943, ordered Interstate to reduce its rates on and after May 15, 1943, by $1,100,345 per annum as applied to its 1941 volume of sales. 3 F.P.C. 416, 432, 434-435. The Commission, on June 9, 1943, denied Interstate's petition for rehearing which Interstate had filed on May 13, 1943. 3 F.P.C. 1018.[1] On June 14, 1943, Interstate filed in the Circuit Court of Appeals for the Fifth Circuit a petition for review of so much of the Commission's order as pertained to its rates on sales for resale to Mississippi River Fuel Corporation (Mississippi), Southern Natural Gas Company (Southern Natural), and

[1] The Commission modified its order to reduce the amount of the rate reduction by $8,762 to $1,091,583, and postponed the effective date to June 15, 1943.

United Gas Pipe Line Company (United Gas) for sale to Memphis Natural Gas Company (Memphis), which the Commission had found to be excessive in the amount of $596,320 per year.[2] The petition for review was thereafter denied by the Circuit Court of Appeals, Judge Waller dissenting (*Interstate Natural Gas Co. v. Federal Power Commission*, 156 F. 2d 949), and this Court, on June 16, 1947, affirmed. 331 U. S. 682. Interstate's petition for rehearing was denied on October 13, 1947. 332 U. S. 785. The reduced rates were put into effect commencing with deliveries for the month of October 1947.

Ancillary to its petition for review in the Circuit Court of Appeals, Interstate prayed the court to stay the operation of the rate reduction order pending review thereof, upon such terms and conditions as might be prescribed by the court. On June 14, 1943, the stay was granted on the condition that Interstate pay into the court's registry the monthly difference between payments under the existing rates and those required under the Commission's order (R. 1, 2). The stay order placed the entire expense of impounding the funds upon Interstate and provided that no interest should be charged Interstate unless allowed by the court upon application (R. 2). It further provided (R. 2):

> The amounts so deposited shall remain on deposit subject, however, to the further Order

[2] By stipulation, Interstate withdrew its assignments of error in so far as they related to the remaining portion of the Commission's rate order.

> or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act.
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> * * * * *
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> Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds.

Pursuant to this order, Interstate deposited $2,444,573 in the registry of the court. Some $320,000 more, not paid into the court's registry, is admitted by Interstate to be due under the terms of the stay (R. 43, 52, 75).

On December 18, 1947, subsequent to this Court's denial of rehearing, Interstate moved the court below for an order distributing the impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for sale to Memphis, and Memphis (R. 16-19).[3] All four companies thereupon moved to intervene in the proceeding (R. 42-48, 49-54, 71-81, 100-103), and intervention was allowed (R. 67). United Gas claimed an allocable share on behalf of Memphis to which it

[3] The sales of natural gas to United Gas involved in that portion of the Commission's order which was reviewed covered the period from June 1, 1943 to December 10, 1945, and were for resale to Memphis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Memphis made its purchases directly from Interstate.

had resold the gas it had purchased from Interstate. (R. 100). The other three purchasers, Mississippi, Southern Natural, and Memphis, claimed their allocable share for themselves and urged, in reliance on *Central States Co v. City of Muscatine*, 324 U. S. 138,[4] that the court had no choice but to distribute the monies to them subject to whatever rights the ultimate consumers might have under state law. The Illinois Commerce Commission, the Public Service Commission of Missouri, the Memphis Light, Gas and Water Division of the City of Memphis, and the City of Jackson, Tennessee, also intervened (R. 68-71, 92-95, 24-41, 81-87). They, together with the Commission, urged in opposition to the claims of the purchasing companies that the *Central States* case was not here applicable inasmuch as the claiming companies were "natural gas companies" whose rates for transportation or sale at wholesale of natural gas in interstate commerce were not subject to local regulation. The Commission further pointed out that voluntary rate reductions and Commission rate reduction orders during the impoundment period showed that these companies were earning not less than a reasonable rate of return on their interstate business without the benefit of the impounded excess.

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[4] The purchasing companies also relied on the unreported *per curiam* opinion of the Eighth Circuit Court of Appeals in *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, ordering distribution of allocable shares to Panhandle's non-disclaiming customers. The Eighth Circuit there based its opinion on the *Central States* case.

The court below held, citing only the *Central States* case, that "whatever may be the rights of ultimate consumers or others to require the pipe line companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipeline companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipeline companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold said companies to account in respect thereof" (R. 105). The court, accordingly, entered an order directing that the fund be distributed to Interstate's immediate purchasers, in accordance with the terms of its opinion (R. 109-112).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the *Central States* case is here applicable.

2. In holding that it was required, as a matter of law, to order the distribution of the fund accumulated under its stay order to immediate purchasers of natural gas from Interstate.

3. In ordering the distribution of that fund to these purchasers.

REASONS FOR GRANTING THE WRIT

The court below, in holding that it was required by *Central States Electric Co. v. City of Muscatine*, 324 U. S. 138, to order the distribution of the accumulated fund to Interstate's immediate purchasers, improperly extended the *Central States* case to a situation in which there remains no means of testing the right of the immediate purchasers to retain this fund. Whether *Central States* goes that far and leaves consumers and state agencies completely remediless is a question of importance which should be settled by this Court.

1. In the *Central States* case, this Court held chasers are themselves "natural gas companies" that a federal court had no power to determine whether the funds accumulated pursuant to its stay order, pending review of a Commission order directing a "natural gas company" to reduce its rates, belonged to the local distributing company purchasing gas from the natural gas company or to its customers, "that being a legislative function of the State of Iowa" (pp. 143-144). In that case, the immediate purchaser was a local distributing company, subject to regulation, if at all, only in accordance with local Iowa law. The Natural Gas Act, this Court there pointed out, left to "the states the function of regulating the intrastate distribution and sale" (p. 144).

The question in this case is whether the *Central States* decision applies where the immediate pur-

within the meaning of, and subject to the Natural Gas Act, and deprives the federal court, which stayed the Commission's order, of authority to distribute the accumulated fund to any one but these immediate purchasers.[5] Nothing in the rationale of the *Central States* decision requires such a result. For in this case the question does not arise out of conflicting claims of a local distributing company and its customers, a matter which this Court treated as being subject to state control. Rather, the immediate purchasers here are themselves "natural gas companies" engaged in transportation or sale at wholesale of natural gas in interstate commerce which is subject to

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[5] If it is not deemed mandatory to distribute the impounded fund to the immediate purchasers, a substantial proportion of the fund will probably reach the ultimate consumers. The West Tennessee Gas Company, one of the distributing companies purchasing gas from Memphis, voluntarily filed a disclaimer of its allocable share (R. 86-87) and the intervention of the Missouri Public Service Commission stated that Laclede Gas Light Company and the Missouri Natural Gas Company would also disclaim their share in favor of their ultimate consumers (R. 93-94). When the United Gas costs were reduced by Interstate's compliance with the Commission's order here involved, in so far as it pertained to gas sold to United Gas for resale in the New Orleans area, United Gas voluntarily lowered its rates to pass on the entire amount of this reduction to local distributing companies which in turn passed it on to ultimate consumers. *Interstate Natural Gas Co., Inc., La. Public Service Commission* v. *Interstate Natural Gas Co., Inc., et al.*, F.P.C. Docket Nos. G-149 and G-132, Order of June 26, 1944.

Experience in other similar distribution proceedings where the percentage of disclaimers, although progressively decreasing, has until this case usually been very high (e.g., 99.5% of the fund disclaimed in the *Natural Gas Pipeline* refund, which was the first such proceeding, and which gave rise to the *Central States* case; 80% in the *Panhandle* refund proceeding), also indicates that other distributing companies would probably also disclaim.

regulation only by the Commission. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498.[6] These activities are not local in character and, even in the absence of Congressional action, are not subject to state regulation. *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456; *Interstate Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83. It was the very absence of state regulatory power in this field that impelled the Congress to enact the Natural Gas Act in 1938. H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Interstate Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610.

There is no question of local law here involved, at least in regard to the claims of Interstate's immediate purchasers as against the more remote purchasers. As between the immediate purchasers and more remote purchasers who resell, the only question is the reasonableness of the return enjoyed by "natural gas companies"—not a question of local law. Nor could a local law question arise

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[6] The immediate purchasers' sales to industrial consumers are, of course, not subject to the Commission's jurisdiction. See Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b); *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U. S. 581. Since this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, various state commissions have indicated an intention to assert jurisdiction over these industrial sales. We do not suggest that the distinctions urged in the text of this petition are applicable to any portion of the impounded fund allocable to these industrial sales.

if the claimants were immediate purchasers and more remote purchasers who do not resell (i.e., ultimate consumers), because that situation would come into being only when the company selling to the ultimate consumers has disclaimed and thereby eliminated the local-law question. Hence there could have been no interference with the rate regulatory jurisdiction of any state if the court below had refused to distribute the accumulated fund to Interstate's customers.[7]

The consequence is not only that the states have no authority over the funds impounded in this case. Unless the court below can order the sum distributed to persons other than the immediate purchasers, presumably to the ultimate consumers to whom the overcharges had apparently been passed on, there is no way in which the intermediate "natural gas companies" can be prevented from retaining an undeserved windfall. For despite the nominal preservation by the court below "of the rights, if any, of ultimate consumers or others to hold said companies to account in respect" of the

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[7] The court below, we believe, could properly have permitted the filing of claims in opposition to those of the immediate purchasers, and ordered the distribution of the impounded funds in accordance with the respective merits of those claims. Cf. *United States* v. *Morgan*, 307 U. S. 183, 197; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157; *Central States Co.* v. *City of Muscatine*, 324 U. S. 138, 146 (dissenting opinion). If any complicated economic or accounting questions had arisen in connection with the reasonableness of rates charged during the impoundment period, the Commission could have provided the Court with any assistance it needed. Cf. *United States* v. *Morgan*, *supra*; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 312-313; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618-619.

accumulated fund, no power resides in any person or tribunal to compel these companies to pass on either to ultimate consumers or distributing companies any of the monies to be contributed to them. There is no privity between these companies and the ultimate consumers as the ultimate consumers purchase from the distributing companies. The distributing companies are without legal rights in the premises, since the rates charged them during the impoundment period were legal rates which must be charged all customers. Section 4(c) of the Natural Gas Act, 15 U. S. C. 717c(c); cf. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 384. And the Commission is without power to affect these rates since it is without jurisdiction to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456. For that reason, the Commission may not require the companies to pass on the benefits of the stay order. Similarly, under the decisions of this Court, the state regulatory commissions are powerless to compel these companies to disgorge that portion of the refund attributable to their

[8] It is interesting to note in this connection that no further legal proceedings were instituted as the result of the preservation of a similar right in the *Central States* case. Nor, for that matter, has anything happened as the result of the reservation of such rights in the unreported proceedings in the Eighth Circuit in the *Panhandle* distribution. This is in part due to the fact that, typically, state commissions, as the Commission here, have no retroactive rate-jurisdiction or reparation power.

interstate sales of gas at wholesale. *Public Utilities Commission* v. *United Gas Co.*, *supra*, at 468; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83; *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498.

Thus the result of the extension of the *Central States* case is to take the excess over the fair return allowed by the Commission from one "natural gas company" and give it to another which is already earning a fair return. It effectively denies all return to the ultimate consumers of the overcharges paid by them for four years while the courts were affirming the reduction ordered for their benefit.

2. The *Central States* case is also distinguishable for other reasons. In the first place, the terms of the stay orders involved are fundamentally different. In the *Central States* case, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i.e., the immediate purchasers to whom this Court subsequently found the money should be distributed. In contrast, the order here involved recognized that the ultimate consumers had a fundamental claim in the impounded fund and the court apparently intended, when it entered that stay, to distribute the fund to the ultimate consumers, barring unforeseen contingencies. It provided (R. 2) that the fund should be returned to "such ultimate consumers of gas or other persons to whom the Court shall find the same should be returned, as contemplated by the provi-

sions of the Natural Gas Act", and further it reserved to itself full jurisdiction to cancel or modify the order "to protect or to promote the rights and interests * * * of the ultimate consumers or other parties financially interested in the impounded funds."

In the second place, in the *Central States* case, the distributing company claiming its allocable share contended that it had not earned a fair return on its investment during the impoundment period and, accordingly, it was doubtful whether the company would have passed the benefits of the reduced rates on to its customers. In the present case, however, the Commission, immediately before the issuance of the Interstate rate order and while it was suspended during the four years that it was being reviewed, investigated into the reasonableness of the rates charged by United Gas, Memphis, Mississippi, and Southern Natural, found them unreasonably high, and either ordered them reduced to reasonable levels or secured voluntary reductions to such levels. In determining what those rates should be, the Commission did not, however, with respect to the period before the affirmance of the Interstate rate order, include the reduction in the cost of purchased gas which would result when and if that order was sustained. *United Gas Pipe Line Co.*, 3 F. P. C. 402,[9] *Memphis Nat-*

[9] As the result of conferences with the Commission, United Gas, on April 1, 1943, filed amendatory contracts affecting a reduction of rates for resale gas in the sum of $2,195,287, annually, based upon its 1942 revenues. 3 F.P.C. at 403.

ural Gas Co., 3 F. P. C. 566;[10] *Southern Natural Gas Co.*, 5 F. P. C. 427, 662 (order allowing rate schedules);[11] *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 363.[12] If the Interstate order had not been stayed, the reduction in its rates would at once have been reflected in reduced operating expenses of its immediate purchasers. The formula used by the Commission in determining the rates of those purchaser companies necessarily would have resulted in additional reductions of their rates but

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[10] The Commission, as the result of conferences with Memphis, issued an opinion dated September 21, 1943, more than five months after the Interstate order, accepting as of July 26, 1943, new rate schedules, which as applied to 1942, reduced Memphis' revenues by about $350,000. 3 F.P.C. 566. The Commission's opinion pointed out that the company's representatives had stated that any future benefit the company might receive by reason of the Interstate Order would be passed on to its customers. 3 F.P.C. at 570. In the court below, the company disputed the correctness of that statement. In 1946, Memphis filed new schedules increasing its rates. Various of its customers protested the increase and the Commission suspended the new rates. 5 F.P.C. 946. Memphis subsequently withdrew its proposed schedules.

[11] The Southern Natural order was entered on July 19, 1946, pursuant to a stipulation between the Commission and the company, and required the company to file new rate schedules which, as applied to its sales for the year ending December 31, 1945, would reduce revenues by $1,200,000.

[12] The Mississippi order, entered November 9, 1945, required the company to reduce its revenue on regulable business by approximately $950,000 as applied to the test year 1943. After judicial review and remand of the case to the Commission (163 F. 2d 433 (App. D. C.)), the company and the Commission entered into a stipulation on May 4, 1948, whereby the Commission was to dismiss its rate investigation against the company, and Mississippi in turn accepted a rate reduction of about $850,000, and further agreed to give effect to that portion of the Interstate rate order accruing since January 20, 1946. No express proviso was made for that portion which had accrued previously, and presumably it was to be disposed of as the courts should direct.

for the stay order. Cf. *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 359, 363.

3. If, notwithstanding the considerations set forth above, the Court is of the opinion that the *Central States* case extends to the situation here presented, then we submit that this Court should reexamine the rationale of that case and so modify it as to eliminate the injustice which presently is resulting from the impact of that decision on the disposition of funds accumulated under stay orders granted for the financial protection of "natural gas companies" which desire to challenge rate reduction orders of the Commission.

Under the interpretation put upon the *Central States* case by the court below, whenever a Commission rate reduction is stayed pending judicial review, the funds accumulated during the period of review, here four years, must be distributed to the natural gas company's immediate purchasers, which claim their share of the fund, without regard to whether these claimants are natural gas companies or local distributing companies, or to whether they earned a reasonable return during the impoundment period. For that period, we submit, not only are the ultimate consumers of gas deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which protection was "the primary aim" of the Natural Gas Act (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612), but the Natural Gas Act is perverted into a law which

"exploits consumers and unjustly enriches distributing companies" and natural gas companies (cf. *Central States Co.* v. *Muscatine*, 324 U. S. 138, 146, 151 (dissenting opinion)).

Moreover, a requirement that the accumulated fund must be turned over to the immediate purchasers without regard to the surrounding circumstances, offers, we submit, a powerful incentive to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds where, as here, the natural gas company, whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system, a situation which is not uncommon in the natural gas industry. For instance, in the present case, Interstate is affiliated with Mississippi. The Standard Oil Company (N. J.) owns 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock and Mr. Frank H. Lerch, Jr., is president of both companies. See Record in *Interstate Natural Gas Co.* v. *Federal Power Commission*, No. 733, October Term, 1946, Vol. I, pp. 241, 242, 245, 247, 250, 254; Vol. II, pp. 706, 723. Where affiliation is present, the requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely to shift the amount of reduction from the treasury of one subsidiary to that of another.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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